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In the Supreme Court of the United States

No. 74-1320

EDWIN ANDERSEN and RAYMOND PLACE,
Petitioners

v.

JAMES HOEY FEAR,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ROBERT P. KANE
Attorney General
Capitol Annex
Harrisburg, Penna. 17120
MICHAEL VON MOSCHZISKER
Deputy Attorney General
Eastern Regional Director
MICHAEL MINKIN
Deputy Attorney General
LAWRENCE BARTH
Assistant Attorney General
206 State Office Building
Philadelphia, Pa. 19130

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No.

EDWIN ANDERSEN and RAYMOND PLACE,
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v.

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Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioners, Edwin Andersen and Raymond Place, respectfully pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Third Circuit, entered in this proceeding on December 26, 1974.

OPINIONS BELOW

The opinion of the United States Court of Appeals is reported at 506 F. 2d 331 (3d Cir. 1974) and appears in Appendix A hereto (App. 13-32).

The opinion of the United States District Court is reported at 364 F. Supp. 53 (E.D. Pa. 1973) and appears in Appendix B hereto (App. 33-54).

JURISDICTION

The United States Court of Appeals entered judgment on December 26, 1974 and denied a petition for rehearing in banc on January 23, 1975. Jurisdiction of this Court is conferred by 28 U.S.C. §1254(1) and §2101(c).

QUESTION PRESENTED

Whether the United States Court of Appeals for the Third Circuit committed error in ruling in a diversity action that, under the Pennsylvania doctrine of sovereign immunity, state employees could be held liable in damages for negligent acts done in the good faith performance of their official duties.

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is Article I, Section 11 of the Constitution of the Commonwealth of Pennsylvania which is set forth in Appendix C (App. 55).

STATUTE INVOLVED

The statute principally involved is the Act of Legislature of the Commonwealth of Pennsylvania of April 23, 1829, P. L. 341, §8, Art. IV (61 P.S. §372), which, with the preamble of section 8, is set forth in Appendix D (App. 56-58).

STATEMENT

James Hoey Fear, Respondent herein, filed a complaint in the United States District Court for the Eastern District of Pennsylvania asserting as jurisdictional basis 28 U.S.C. §1331 and §1343.

The complaint alleged that as a result of the negligence of the Petitioners, physicians employed by a Pennsylvania correctional institution, Respondent suffered permanent disability and injury to his arm. Pretrial motions were filed and the civil rights aspect of the suit and the Commonwealth of Pennsylvania as a defendant were dismissed. However, the case proceeded to trial as a diversity action in negligence on the basis of a "Traverse to Answer" filed by Respondent. After trial, judgment was entered against Petitioners Andersen and Place in the amount of $20,000.00.

An appeal was taken to the United States Court of Appeals for the Third Circuit, which on December 26, 1974 affirmed the District Court judgment with an opinion by Seitz, Ch. J., and Gibbons, C.J., with Garth, C.J. dissenting. Petitioners filed a petition for rehearing in banc which was denied on January 23, 1975.

REASONS FOR GRANTING THE PETITION

The United States Court of Appeals for the Third Circuit has decided an important state question in a way in conflict with applicable state law.

The United States Court of Appeals for the Third Circuit in its opinion of December 26, 1974, has rendered a decision contrary to a long-standing doctrine of Pennsylvania law. By so doing the Court of Appeals has abrogated a substantive right of Commonwealth defendants in federal diversity actions without any basis in Pennsylvania law and in violation of its own previous decisions. Principles of federal comity as well as the teaching of *Erie Railroad Company v. Tompkins,* 304 U.S. 64, 58 S. Ct. 817 (1938), require that this error be corrected.

Article I, Section 11 of the Constitution of the Commonwealth of Pennsylvania (App. C, infra) provides in relevant part:

> "Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct."

The Pennsylvania Legislature has never enacted any provision for suits against the Commonwealth, and as recently as 1970 in the Appellate Court Jurisdiction Act of 1970, Act of July 31, 1970, P. L. 673, No. 223 *et seq.* (17 P.S. §211.101 *et seq.*), has declined to do so. In Article IV, §401(c) of that Act (17 P.S. §211.401(c)) the

Legislature stated, "The provisions of clause (1) of subsection (a) of this section relating to [the jurisdiction of the Commonwealth Court in] actions or proceedings against the Commonwealth *shall not be construed as a waiver by the Commonwealth of immunity to suit.*" (Emphasis added.)

As developed in Pennsylvania courts, the immunity of the Commonwealth has been held to protect from liability for damages Commonwealth officers and employees acting within the scope of their duties. Over the years a dichotomy between high and low level employees evolved whereby high level employees qualified for absolute immunity from suit whereas the immunity from liability for damages of lower level employees was conditioned on their actions not being wanton or malicious. Nonetheless, absent a clear showing of wanton or malicious behavior, the courts of the Commonwealth of Pennsylvania have continually held that all employees of the Commonwealth are immune from liability for damages.

This immunity, an established principle in the mid-Nineteenth Century, *Yealy v. Fink*, 43 Pa. 212 (1862), and *Burton v. Fulton*, 49 Pa. 151 (1865), has continued as the law in Pennsylvania to the present. *DuBree v. Commonwealth*, 8 Pa. Commonwealth Ct. 567, 303 A. 2d 530 (1973); *McCoy v. Commonwealth*, 9 Pa. Commonwealth Ct. 107, 305 A. 2d 746 (1973), *aff'd per curiam*, —— Pa. ——, 326 A. 2d 396 (Oct. 16, 1974). The *DuBree* opinion, cited only in a footnote by the Court of Appeals, 506 F. 2d 331 at 334; App. A, p. 20, infra, provides a recent and full exposition of the doctrine of sovereign immunity as it currently exists and operates as to individual defendant employees of the Commonwealth

of Pennsylvania. In *DuBree* the Pennsylvania court found that under Pennsylvania law all employees of the Commonwealth are immune from damages regardless of the importance of, or the amount of discretion involved in, the exercise of their duties. The court, without reference to discretion as a qualification, said at 303 A. 2d 534,

> "To place liability upon a public official who is not a high public official, therefore, it is . . . necessary to show that the officer concerned was not acting within the scope of his authority, and that the conduct complained of was intentional, as well as malicious, wanton or reckless. He may escape liability, however, if he did act within the scope of his authority and if his negligent conduct was not intentionally malicious, wanton or reckless."

This result, the Pennsylvania court stated, was mandated by Pennsylvania Supreme Court authority.

> "Upon a careful review and evaluation of these precedents, it appears to us that the doctrines expounded in Burton, supra, and Yealy, supra, are still the law of Pennsylvania and must be adhered to by this Court, and since we continue to credit the Commonwealth with sovereign immunity, it is still as true as it was in the 19th century that such immunity would be unavailing if there were not also some form of immunity granted to those officers and employees whom the Commonwealth must necessarily employ."

This view of the doctrine was restated in *McCoy v. Commonwealth,* supra, where the court, relying on *DuBree,* granted the defendant Commonwealth agencies' and

employees' preliminary objections based on immunity. The Pennsylvania Supreme Court, in affirming this case on October 16, 1974, —— Pa. ——, 326 A. 2d 396, continued its support for the validity of the Commonwealth Court's determinations in this area of the law. See also, *Biello v. Pennsylvania Liquor Control Board,* 454 Pa. 179, 301 A. 2d 849 (1973); *Brown v. Commonwealth,* 453 Pa. 566, 305 A. 2d 868 (1973).

Despite the existence of these Pennsylvania Supreme Court and other decisions providing for immunity in the widest of circumstances, the Court of Appeals declined to find it applicable to Petitioners. Instead, the Court of Appeals relied on a single decision of a lower level appellate court whose jurisdiction does not even include suits brought against the Commonwealth or its employees. See, Appellate Court Jurisdiction Act of 1970, Act of July 31, 1970, P. L. 673, No. 223, Art. IV, §401(a)(1) (17 P.S. §211.401(a)(1)). Furthermore, the case thus followed by the Court of Appeals, *Ammlung v. City of Chester,* 224 Pa. Superior Ct. 47, 302 A. 2d 491 (1973), involved a suit against a *municipality and its employees* who under Pennsylvania law, are not entitled to the sovereign immunity accorded the Commonwealth. *Ayala v. Philadelphia Board of Public Education,* 453 Pa. 584, 305 A. 2d 877 (1973). By virtue of this authority only, the Court of Appeals injected the criterion of discretionary vs. non-discretionary (or ministerial) functions, which it itself found to be confusing (506 F. 2d at 335, f.n. No. 4; App. A, p. 21, f.n. No. 4, infra), into the realm of conditional sovereign immunity within the Commonwealth of Pennsylvania.

The Pennsylvania Supreme Court, unlike the Court of Appeals here, has never considered the discretionary

or ministerial nature of an official's tasks as being determinative of the official's conditional immunity. Any such consideration of an official's exercise of discretion by the Pennsylvania Supreme Court was only to test an official's level of importance and hence his entitlement to *absolute* immunity. See *Montgomery v. City of Philadelphia,* 392 Pa. 178, 140 A. 2d 100 (1958). Since its decisions in *Burton v. Fulton,* supra, and *Yealy v. Fink,* supra, in the mid-Nineteenth Century, the Pennsylvania Supreme Court has put only the limitation of non-malicious behavior on the conditional immunity enjoyed by employees of the Commonwealth.

The Circuit Court also grounds its decision on its conclusion that the Petitioners, by breaching a statutory duty supposedly owed the respondent under the Act of April 23, 1829, P. L. 341, §8, Article IV (61 P.S. §372); App. D, infra, are liable under a negligence per se theory. Petitioners, however, maintain that even if *negligence* is thereby established by this statute, their immunity precludes the recovery of any damages.

In actuality, however, the statute relied on by the Court of Appeals creates no duty in the Petitioners and none owed to the Respondent. The statute, which was enacted in 1829 and which heretofore has never been the subject of litigation, provides that "when he shall have reason to believe" that a prisoner's treatment may prove harmful, the physician shall inform the warden and enter his observations in a journal. However, such a duty only arises after the physician has determined on the basis of his professional judgment that the penitentiary's treatment of the prisoner is harmful. If after examination and in his professional judgment the physician determines that

the prisoner's treatment will not prove harmful, no such duty arises (App. D, infra).

That no duty is owed to the individual prisoner can be seen by reference to the preamble to §8 of the original act of which Article IV is a part, which states:

> "... That the following rules and regulations for the *better ordering and government of said penitentiaries* shall be and continue in force until altered by the legislature, or in the matter hereinafter stated." (Emphasis added.) (App. D, infra.)

The preamble and general tenor of the statute indicates that no duty toward individual prisoners was intended. The legislature wished to ameliorate the harsh conditions of early Nineteenth Century prisons, not create a cause of action against prison physicians. A finding of negligence per se for a breach of a duty owed to the plaintiff by appellants was, therefore, erroneous.

In reaching its decision in this case the Court of Appeals not only misinterpreted the above statute and failed to follow the foregoing Pennsylvania decisions, but also failed to follow its own recent precedent in *Daye v. Commonwealth of Pennsylvania,* 483 F. 2d 294 (3d Cir. 1973), in which the Pennsylvania authorities urged by Petitioners were set out and followed. Instead, the Court of Appeals by following a minor appellate court decision and injecting a consideration never used by the Pennsylvania Supreme Court, abrogated a doctrine of state law established by the Pennsylvania courts. By so doing, the Court of Appeals disregarded its own sound advice in *Daye,* in which it said:

"Whether or not the doctrine of sovereign immunity as an 'anachronism' that provides 'unjust' results, Biello, supra (Nix dissenting), is for the courts of the Commonwealth to resolve. We are required to follow the state law insofar as diversity is a jurisdictional basis in these suits and are unable to alter that which the state courts and legislature have refused to change." 483 F. 2d at 299.

CONCLUSION

Petitioners submit that the question presented herein is of great public importance and merits review by your Honorable Court. By deciding this issue in conflict with the applicable state law, the Court of Appeals has, contrary to the policy and law of the Commonwealth of Pennsylvania, provided a forum wherein employees of the Commonwealth of Pennsylvania can be mulcted in damages for negligence occurring in the good faith performance of their duties. If this law and policy is unwise and merits reversal it is for the courts and legislature of the Commonwealth of Pennsylvania, and not the federal courts, to decide.

For these reasons, the Court should issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

ROBERT P. KANE
Attorney General
Capitol Annex
Harrisburg, Penna. 17120
MICHAEL VON MOSCHZISKER
Deputy Attorney General
Eastern Regional Director
MICHAEL MINKIN
Deputy Attorney General
LAWRENCE BARTH
Assistant Attorney General
206 State Office Building
Philadelphia, Penna. 19130

April, 1975

APPENDIX A
[Reported at 506 F. 2d 331]

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 73-2052

United States of America ex rel.
James Hoey Fear,

Appellee

v.

Alfred T. Rundle, Superintendent, Edwin Anderson, Physician, Raymond Place, Physician, and Commonwealth of Pennsylvania,

Appellants

(D. C. Civil Action No. 69-78)

Appeal From the United States District Court for the Eastern District of Pennsylvania

Argued September 5, 1974
Before Seitz, *Chief Judge,* Gibbons and Garth, *Circuit Judges*

Gerald Jay Pomerantz, Esquire, Suite 940, P.S.F. S. Building, Philadelphia, Pennsylvania, *Attorney for Appellee.*

Israel Packel, Attorney General, Lawrence Barth, Assistant Attorney General, Michael Minkin, Assistant Attorney General, Chief, Civil Litigation, Eastern Region Office, Michael von Moschzisker, Deputy Attorney General, Eastern Regional Director, *Attorneys for Appellants.*

OPINION OF THE COURT
(Filed December 26, 1974)

SEITZ, *Chief Judge.*

This is an appeal from a lower court monetary judgment in favor of the plaintiff in a diversity action based on negligence. The action was initiated by a pro se complaint of a former inmate in a prison operated by the Commonwealth of Pennsylvania. The plaintiff sued the superintendent of the prison in which he was confined and two physicians associated with the prison who had treated him for an injury sustained during his imprisonment. The plaintiff alleged that the medical treatment which he received with respect to his injury was negligent and that all three defendants were responsible for this negligent care. The lower court, which heard the case without a jury, found that the defendant physicians had been negligent and were liable to the plaintiff since they were not protected by sovereign immunity. The court, however, held that the defendant superintendent, by virtue of his office and duties, was immune from suit. The defendant physicians have appealed, alleging that they, as public officers, are also immune from suit.

Since we are of the opinion that the evidence supports the lower court's finding of negligence on the

part of the physicians, the essential issue on this appeal is whether they are shielded from plaintiff's suit because they are officers of the Commonwealth of Pennsylvania.

Factual Background

The cause of action in this case arose out of a series of events commencing around 2:00 p.m. on January 24, 1968, at Graterford prison in Montgomery County, Pennsylvania, the correctional facility in which plaintiff was confined. At that time the plaintiff, who was unloading a truck, slipped on a piece of ice in the truck bed and fell, injuring his right wrist as he attempted to break his fall. Shortly thereafter, the plaintiff reported to the prison infirmary where he was examined by the defendant Dr. Anderson, who was the prison's full-time physician. At that time, Dr. Anderson diagnosed the wrist injury as a sprain.

The following day, the plaintiff was examined by the defendant, Dr. Place, who worked for the prison on a part-time basis. After the examination by Dr. Place, the plaintiff's wrist was x-rayed. Almost a week later, on January 30, 1968, the x-ray report was made revealing that the navicular bone in the plaintiff's right wrist had been fractured. Despite the medical standard prevalent in Montgomery County in 1968, which the district court found to require that a patient with a broken bone be instructed to keep the injured area immobilized and that consultation with an orthopedic specialist be provided as soon as possible, the defendant physicians failed to inform plaintiff that his wrist was broken. They also chose to comply with a prison administrative rule then in effect which re-

quired there to be fifteen inmates in need of consultation with an orthopedic specialist—regardless of the time any number less than fifteen had to wait—before such a specialist could be brought into the prison.

Because of the negligence of the defendant physicians, the plaintiff was not even placed on the "list of fifteen" until February 8, 1968, a full two weeks after the navicular bone in his right wrist was fractured. As a result of the defendants' negligent decision to follow an administrative rule which directly contravened the standards for practice of their profession, the plaintiff did not actually see an orthopedic specialist until April 11, 1968, two and one half months after his injury.

On April 11, the orthopedic specialist placed a cast around the plaintiff's wrist. From that time until some time in August of the same year, the plaintiff wore a cast on his wrist. Throughout the entire period, the plaintiff continued to work as a mechanic since defendants did not execute a medical work release in his behalf. Moreover, the defendants did not recommend to the warden that the plaintiff should be relieved of his duties, despite a Pennsylvania statute in effect at that time which required:

> . . . The [prison] physician shall inquire into the mental as well as the bodily state of every prisoner, and when he shall have reason to believe that the mind or body is materially affected by the discipline, treatment, or diet, he shall inform the warden thereof, and shall enter his observation on the journal hereinafter directed to be kept, which shall be an authority for the warden for altering

> the discipline, treatment or diet of any prisoner, until the next meeting of the inspectors, who shall inquire into the case and make orders accordingly. Pa. Stat. Ann., Tit. 61, §372 (1964).

In August, when the cast was removed from his wrist, the plaintiff was informed that the two segments of the navicular bone had failed to knit. The lower court concluded that the failure to heal could be attributed to the defendants' negligence in (1) failing to see to it that the plaintiff's wrist was immobilized at an early stage, (2) failing to immediately arrange consultation between plaintiff and an orthopedic specialist, (3) failing to execute a medical release in behalf of the plaintiff so that he would not be required to perform his duties as a mechanic, and (4) failing to comply with Section 372 of Title 61, Pa. Stat. Ann. (hereinafter "Section 372"). The lower court found that as a result of the defendants' negligence the plaintiff had suffered a substantial impairment of the use of his right hand.

The defendants contend that this is in reality a suit against the Commonwealth and is accordingly controlled by early cases which hold that the Commonwealth and its agents are shielded from suit under the doctrine of sovereign immunity.[1] In advancing this contention, the defendants argue that this case falls within the rule enunciated in Biello v. Liquor Control Board, 454 Pa. 179, 301 A.2d 849 (1973).

Biello involved a wrongful death action against the Pennsylvania Liquor Control Board and its individual members. In that case, the Supreme Court of

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[1] *See e.g.*, O'Connor v. Pittsburgh, 18 Pa. 187 (1851).

Pennsylvania, having concluded that the individual defendants were "nominal parties to the record" and that the suit was, in effect, a suit against an agency of the Commonwealth, held that the Board was immune from suit since it was performing a governmental function. *See also* Brown v. Commonwealth, 453 Pa. 566, 305 A.2d 868 (1973).

We do not believe, as the defendants contend, that the individual defendants in this case, like those in *Biello,* are merely "nominal parties to the record" and the present action is in reality a suit against the Commonwealth. We think that *Biello* can be distinguished from the case at bar because in *Biello,* none of the persons sued were individually the perpetrators of the acts that allegedly were the direct cause of the personal injuries which were the gravamen of the suit in that case. The plaintiff in *Biello* alleged that the Commonwealth, the liquor control board, its individual members, and the manager of a retail store were liable for the sale of liquor to a minor who subsequently became intoxicated and, allegedly because of his intoxicated state, plunged from a fire escape to his death.

In *Biello* the defendants were not *actors;* they were sued because of their official responsibilities with respect to the retail sale of liquor on the theory that they should be held vicariously liable. Here, however, plaintiff sues two *actors,* whose decision to act in one way and whose failure to act in another were found by the lower court to be the proximate cause of plaintiff's injuries. We therefore believe that the instant case is governed by Pennsylvania decisions dealing with suits against public officials as individuals.

Montgomery v. Philadelphia, 140 A.2d 100 (Pa. 1958), relied upon by the district court in reaching its decision in the case at bar, is one of the most significant Pennsylvania cases dealing with suits against public officials as individuals. *Montgomery* involved a damage action grounded in slander that was brought by a contractor, who had undertaken to build two buildings for the City of Philadelphia, against two city officials. The defendants claimed they were immune from suit.

In responding to this defense, the Supreme Court of Pennsylvania noted that there are two forms of official privilege commonly recognized in this country. Under both, conduct otherwise actionable escapes liability because it is in furtherance of some socially important interest. The first form is qualified immunity. It shields a public official who acts in the performance of his official duties so long as the plaintiff cannot prove that the official has abused the privilege by acting in an improper manner, or did not have reasonable justification for his actions.

The second form is absolute immunity. It shields an official absolutely, that is to say, without regard for whether he had reasonable justification for his actions so long as he acted in the course of his official duties.

The *Montgomery* court noted that not every official was protected by absolute immunity. The Court stated:

> [W]hether a particular public officer is protected by absolute privilege should depend upon the nature of his duties, the importance of his office, and

> particularly whether or not he has any policy-making functions. *Id.* at 105.

However, the Court found that both city officials involved in the case before it were entitled to absolute immunity.

Although *Montgomery* was a defamation case, a subsequent opinion of the Pennsylvania Supreme Court, *Jonnet v. Bodich,* 431 Pa. 59, 244 A.2d 751 (1968), specifically stated that the *Montgomery* rule was not to be limited to defamation cases. Moreover, despite the municipal context of the suit in *Montgomery,* we think the doctrine enunciated in that case was intended to apply to public officers generally. Thus, the *Montgomery* dichotomy of high and low officials is potentially applicable to the instant case. *Montgomery,* however, because it was concerned with the immunity of high officials, never indicated the nature and extent of the "qualified" immunity which is extended to low officials. A recent decision of the Superior Court of Pennsylvania, Ammlung v. City of Chester, 302 A.2d 491 (Pa. Super., 1973), suggests that the qualified immunity to which lower officials are entitled affords them protection with respect to any exercise of discretion which is not reckless, wanton or malicious.[2] Indeed, this is exactly the limitation imposed

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[2] A decision of the Commonwealth Court of Pennsylvania, Dubree v. Commonwealth, 303 A.2d 530 (Pa. Cmmnwlth., 1973), held:

> To place liability upon a public official who is not a high public official, therefore, it is merely necessary to show that the officer concerned was not acting within the scope of his authority, and that the conduct complained of was intentional, as well as malicious, wanton or reckless. *Id.*

by an early decision of the Pennsylvania Supreme Court, *Yealy v. Fink*, 43 Pa. 212 (1862), on the immunity held by certain public officials involved in that case.[3]

No case has come to our attention that applies the *Montgomery* rule as expanded by *Ammlung* to a damage suit against a low official in the performance of a nondiscretionary duty.[4] However, we believe that the instant case presents such a fact situation.

Based on our reading of *Yealy*, *Montgomery* and *Ammlung*, we believe that the rule in Pennsylvania is that persons are deemed low officials if they do not have extensive responsibility to fashion public policies, and if their duties and office are, when judged in the broad context of the state government in its entirety, not so consistently of public significance as to warrant

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[3] 43 Pa. at 216. The Superior Court of Pennsylvania in *Ammlung*, *supra*, apparently concluded that the county supervisors in *Yealy* were low officials, 302 A.2d at 495.

[4] Some cases have suggested that duties of a public officer that are nondiscretionary should be deemed "ministerial." *See Ammlung v. City of Chester*, *supra*; 67 C.J.S. § 127 at 422. But courts and commentators alike have expressed discontent with the discretionary-ministerial distinction. *See e.g.*, Larson v. Domestic Foreign Corp., 337 U.S. 682, 688 (1949); Gustavsson v. Floete, 299 F.2d 655 (2d Cir. 1962); Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 Harv. L. Rev. 209, 218-19 (1968). Although a distinction must, of necessity, be drawn between functions which are discretionary and those which are not, we believe that the labels "discretionary" and "ministerial" are too often used in a manner that tends to preclude careful analysis of a public official's legal mandate to determine whether that official has, by law, been given discretion to perform a specific act.

the extension to them of an extraordinary and privileged status.

Applying this rule of law to the defendant physicians we find that neither defendant had sufficiently broad responsibility to formulate public policy or had a sufficiently significant office or sufficiently important duties, when compared with the office and duties of other state officials such as the deputy commissioner of public property or the city architect in *Montgomery,* to warrant his classification as a "high" official.

As low officials, the defendants' liability to plaintiff for their tortious action or failure to act is dependent, under *Montgomery* and *Ammlung,* upon whether their decision to act or to refrain from acting was left to their discretion by state law. Were defendants performing a discretionary function when they caused plaintiff's injury, they would only be liable to plaintiff, under Pennsylvania law, if their action or failure to act was reckless, malicious or wanton. Were the defendants performing a non-discretionary function, we believe they could be held liable to plaintiff, under Pennsylvania law, if their action or omission was merely negligent.

Although in the normal performance of their duties as prison physicians, the defendants may have had certain discretionary functions, they also had a statutory duty, under Section 372, to make inquiries concerning the health of each prisoner, and upon learning of physical infirmity affected by prison treatment, to inform the warden of the condition.

This duty was part of a statutory scheme which provided the warden with the opportunity and author-

ity to alter the treatment of a prisoner in order to protect his health.[5] The lower court found that the defendant physicians had failed to comply with this statute. We find that the defendant physicians had a non-discretionary duty to comply with the statute. We conclude that as low officials who failed to perform a non-discretionary act, the defendants are not to be judged by the "reckless, wanton or malicious" standard, but by the standard of negligence used in malpractice actions generally in Pennsylvania.[6]

Inasmuch as the district court found the standard of practice in the Montgomery County area at the time of plaintiff's injury dictated that plaintiff be given a work release and because we are of the opinion that Section 372 provided a statutory mandate with respect to such an alteration of a prisoner's routine, we conclude that the defendants' failure to perform the non-discretionary act required by Section 372 constituted negligence when judged by the standards of defendants' profession. Furthermore, since the district court found that defendants' failure to comply with Section 372 was a substantial factor in causing plaintiff's injury to heal improperly, we conclude that the

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[5] Cases in other jurisdictions have found strong public policies to underly statutory provisions similar to those here. See, e.g., Pisacano v. State, 8 A.D. 2d 335, 188 N.Y.S.2d 35 (1959).

[6] In Pennsylvania the rule is that the doctor is required to: "exercise only such reasonable skill and diligence as is ordinarily exercised in his profession," Duckworth v. Bennett, 320 Pa. 47, 181 A. 558, 559 (1935), *see also* Saltzer v. Reckford, 319 Pa. 208, 179 A. 449, 450 (1935), and to give "due regard to the advanced state of the profession and to exercise the care and judgment of a reasonable man in the exercise of medical skill and knowledge." Incollingo v. Ewing, 444 Pa. 263, 299, 282 A.2d 206, 217 (1971).

district court was correct in holding defendants liable to plaintiff.[7] Finding liability on this one ground renders it unnecessary for us to determine whether the defendants here would be liable to the plaintiff under Pennsylvania law, in the absence of Section 372.

The judgment of the district court will be affirmed.

GARTH, *Circuit Judge,* dissenting:

I respectfully dissent inasmuch as I believe the substantive law of Pennsylvania dictates a conclusion as to defendants' liability contrary to that reached by the majority.

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[7] We have no trouble, as does the dissent, in finding that defendants' failure to comply with Section 372 proximately caused plaintiff's injury. Although the district court did not use the term "proximate cause," it did find that defendants' failure was a substantial factor in causing plaintiff's injury. The Supreme Court of Pennsylvania has held, in a negligence case where the plaintiff claimed to have been injured by the defendant's failure to comply with a statutory duty: "It is well settled in Pennsylvania that in order to find that defendant proximately caused an injury it must be found that his allegedly wrongful conduct was a substantial factor in bringing about plaintiff's injury even though it need not be the only factor." Majors v. Brodhead Hotel, 416 Pa. 265, 205 A.2d 873, 877 (1965). We have no difficulty finding that plaintiff, in the instant case, was in the class of people protected by Section 372, toward whom defendants had a statutory duty. We think that the expert testimony contained in the record adequately supports the district court's holding that defendants' neglect of this duty was a substantial factor in causing plaintiff's injury. *Compare* Dornon v. Johnston, 421 Pa. 58, 218 A.2d 808 (1966).

Insofar as diversity is the jurisdictional basis in this action, we are required to follow state law. *Erie R.R. Co. v. Tompkins,* 304 U.S. 64 (1938). Although the doctrine of immunity may be under attack in Pennsylvania and immunity has been withdrawn from governmental units, municipal corporations and quasi-corporations, *Ayala v. Philadelphia Board of Public Educ.,* 305 A.2d 877 (Pa. Sup. Ct. 1973), it nevertheless remains that state's law that employees of Pennsylvania may, under certain circumstances, be immune from liability. *Brungard v. Hartman,* 315 A.2d 913 (Pa. Comwlth. Ct. 1974); *Dubree v. Commonwealth of Pennsylvania,* 8 Pa. Cmwlth. 567, 303 A.2d 530 (1973); *Ammlung v. City of Chester,* 302 A.2d 491 (Pa. Super. Ct. 1973). *See Daye v. Commonwealth of Pennsylvania,* 483 F.2d 294, 299 (3d Cir. 1973) (applying Pennsylvania law). I believe those circumstances giving rise to immunity are present in this case. Accordingly, I would give effect to the doctrine of conditional immunity for lower level officials or employees of the Commonwealth, even though I would be inclined to hold the defendants liable were I presented with this issue on a *de novo* basis and was not bound by the prevailing substantive law of Pennsylvania. Where the state courts and the state legislature have declined to revise state law granting conditional immunity, the federal courts may not do so in a case based on federal diversity jurisdiction. *Daye,* 483 F.2d at 299. *Cf. Harris v. Pennsylvania Turnpike Comm'n.,* 410 F.2d 1332 (3d Cir. 1969).

I agree with the majority's characterization of the defendant doctors as lower level state employees. Characterized as such, as I read the governing Pennsylva-

nia cases, the defendants are entitled to conditional immunity if they were acting within the scope of their authority and if their alleged negligent conduct was not intentionally malicious, wanton or reckless. *Burton v. Fulton,* 49 Pa. 151 (1865); *Yealy v. Fink,* 43 Pa. 212 (1862); *Dubree v. Commonwealth of Pennsylvania, supra. See Daye v. Commonwealth of Pennsylvania, supra* (where this Court affirmed the continued application of Pennsylvania's doctrine of immunity for state officials and employees). As the plaintiff has failed to allege or prove that the defendants' conduct was intentionally malicious, wanton or reckless in their medical treatment of him, I believe that this Court is obliged to reverse the district court's determination of liability inasmuch as Pennsylvania law provides that the defendants are still cloaked with conditional immunity.[1] The allegations in this complaint of simple negligence and the failure by the district court to find that the defendants' conduct was intentionally malicious, wanton or reckless are insufficient bases on which the defendants, as employees of the Commonwealth, may be found liable. *Brungard v. Hartman,*

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[1] Pennsylvania law with regard to the individual liability of employees of the Commonwealth (state highway officials) was set forth in Dubree v. Commonwealth of Pennsylvania, 8 Pa. Cmwlth. at 574-75, 303 A.2d at 534:

> To place liabiilty upon a public official who is not a high public official, therefore, it is merely necessary to show that the officer concerned was not acting within the scope of his authority, and that the conduct complained of was intentional, as well as malicious, wanton or reckless. He may escape liability, however, if he did act within the scope of his authority and if his negligent conduct was not intentionally malicious, wanton or reckless.

315 A.2d at 914-15; *Dubree v. Commonwealth of Pennsylvania,* 303 A.2d at 534.

Despite the consistent expressions of the Pennsylvania courts that low-level public employees[2] are to be afforded conditional immunity, the majority, without citation of any Pennsylvania precedent, contends that "as low officials who failed to perform a non-discretionary act, the defendants are not to be judged by the 'reckless, wanton or malicious' standard, but by the standard of negligence used in malpractice actions generally in Pennsylvania." (Majority Opinion at 9) (footnote omitted). The majority's formula of liability includes as an essential ingredient the additional characterization of a "ministerial-discretionary" distinction. I believe, as does the majority, that this distinction is neither helpful nor controlling in the determination of conditional immunity under Pennsylvania law. (*Accord,* Majority Opinion at 7 n.4). Yet, the majority finds it necessary to accept this distinction in order to support its theory of public employee lia-

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[2] *Burton, supra,* involved members of a school board who were held conditionally immune from liability for having removed a teacher from her position; *Yealy, supra,* involved two highway supervisors who were held immune from liability when a bridge they constructed diverted water from a down-stream mill; *Brungard, supra,* involved a college professor who was held immune from liability for an explosion in a laboratory classroom; *Dubree, supra,* involved the following state highway employees, all of whom were held to be conditionally immune from liability in a wrongful death action based on allegations that the defendants had removed a bridge and had not given warnings of the excavation; a District Engineer; and Assistant District Engineer; a Superintendent of the Maintenance Department; an Assistant Superintendent of the Maintenance Department; and two Foremen.

bility. Simple negligence, the majority states, is sufficient to hold these employees liable because the defendants had a non-discretionary duty to comply with an 1829 statute[3] and they failed to perform that non-discretionary act. In essence, the majority is of the view that these defendants were negligent as a matter of law and that because their negligence *per se* was found by the district court to be a substantial factor in causing plaintiff's injury, the defendants were correctly held to be liable.

Even if I were to agree with the majority's theory of liability and non-immunity (and I do not agree for the reasons expressed above), nevertheless I would still reverse the district court's judgment as I find no evidence in the record which supports the liability of the defendants for having violated a statutory duty.

The defendants' violation of a statute, constituting negligence *per se*, cannot support the imposition of liability upon the defendants unless the violation of that statute proximately caused the injury sustained by the plaintiff. *Wisniewski v. Chestnut Hill Hospital,* 403 Pa. 610, 170 A.2d 595 (1961); *Shakley v. Lee,* 368 Pa. 476, 84 A.2d 322, 323 (1951). Where the critical facts,

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[3] 61 P.S. § 372 in pertinent part provides:

. . . The [prison] physician shall inquire into the mental as well as the bodily state of every prisoner, and when he shall have reason to believe that the mind or body is materially affected by the discipline, treatment, or diet, he shall inform the warden thereof, and shall enter his observation on the journal hereinafter directed to be kept, which shall be an authority for the warden for altering the discipline, treatment or diet of any prisoner, until the next meeting of the inspectors, who shall inquire into the case and make orders accordingly.

including those of causal connection are in dispute, as they are here, "proximate cause" is to be determined by the fact-finder—here the district court judge. *See* W. Prosser, Law of Torts, §52 (3d ed. 1964). *Compare Schreffler v. Birdsboro Corp.*, 490 F.2d 1148 (3d Cir. 1974) (applying Pennsylvania law); *Liney v. Chestnut Motors, Inc.*, 421 Pa. 26, 218 A.2d 336 (1966). Although the trial judge concluded that the violation of the statute was a "substantial factor" in causing the plaintiff's injury, there is a total absence of any evidence in the record below to support a finding that the statutory violation was a proximate cause of the plaintiff's injury.[4]

The pertinent portion of the statute on which the majority relies in affirming the district court's judgment, involves the obligation of the defendant doctors to record their medical observations of the prisoner and to inform the warden if the physician believes the prisoner's health is affected by the prisoner's routine. In the record below there is no evidence of:

> (a) the relationship, if any, of the medical work release to the statute claimed by the majority to have been violated by the defendants;

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[4] This conclusion is found in Conclusions of Law 10 through 12 of the district court's opinion. Although denominated a Conclusion of Law, a finding of proximate cause in the instant context is properly a finding of fact. *See* Kridler v. Ford Motor Co., 422 F.2d 1182, 1185 (3d Cir. 1970) (applying Pennsylvania law); Anderson v. Bushong, 404 Pa. 382, 391, 171 A.2d 771, 775 (1961). Findings of fact are not to be set aside unless clearly erroneous, F.R. Civ. P. 52(a), Krasnov v. Dinan, 465 F.2d 1298 (3d Cir. 1972), and thus cannot stand in the absence of an evidential basis. Thornton v. United States, 493 F.2d 164, 167 (3d Cir. 1974).

(b) whether or not entries were made by the defendants in the journal directed to be kept;

(c) whether the warden was informed by the defendants—or if and when he consulted the medical journal;

(d) whether the statutory procedures were followed at any time;

(e) the relationship of the statutory procedures to the administrative rule requiring 15 inmates to be in need of an orthopedic specialist before such a specialist could be brought into the prison;

(f) when or if the next meeting of inspectors (now the Board of Trustees) would take place;

(g) the effect upon the prisoner's injury of defendants' alleged failure to comply with the statute (apart from the failure to execute a medical work release).

In short, there is no competent evidence in the record to supply the neecssary causal nexus between the purported violation of 61 P.S. §372 and the injury suffered by the plaintiff.

Further, the only evidence in the record pertaining to an action of a prison physician which would directly affect the prisoner's daily routine (without hospitalizing the prisoner) was the evidence of the doctors' failure to issue a medical release[5] excusing the

[5] The district court treated the failure of the defendants to execute a medical release separately from the failure of the defendants to comply with 61 P.S. §372. In Conclusion of Law 9,

plaintiff from work. However, as noted, no proof was submitted and the record is silent, as to the relation, if any, between the defendants' failure to execute a medical release, the defendants' obligation under the pertinent portion of the statute involved here, and the proximate cause of the injury suffered by plaintiff.

Confronted then, as I am, with an absence of evidence pertaining to the 1829 statute, and being unwilling to accept the premise that a violation of that statute must of necessity constitute the proximate cause of any injury suffered by a prisoner who was improperly treated by prison physicians, I believe that the theory on which the majority affirms defendants' liability is untenable here.

Furthermore, I believe that defendants' violation of the statute (if in fact such a violation occurred), constituting negligence as a matter of law, does not, of and by itself, supply the essential willfulness or wantonness precluding a defense of conditional immunity. *E.g., Gulf, M. & O. R. Co. v. Freund,* 183 F.2d 1005 (8th Cir. 1950), *cert. denied,* 340 U.S. 904 (1950) (applying Illinois law). I believe that defendants' violation of the statute involved here, may result in a characterization of their conduct as being negligent with all the effects of common law negligence, but with no greater effects. *See* W. Prosser, Law of Torts, § 35 at

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the district court held the failure of the physicians to execute a medical release breached a duty owed to the plaintiff and that the negligence resulting therefrom was a substantial factor in causing the plaintiff's fracture to heal improperly. In any event, as I read the majority opinion, it does not rely upon the failure of the defendants to issue a medical release as a basis for affirming liability.

202 (3d ed. 1964). Consequently, their negligence as a matter of law is not of the magnitude required to hold them to be liable as employees of the Commonwealth.

Accordingly, I would reverse the judgment of the district court which holds the defendant doctors liable as: (1) the plaintiff has failed in his proofs to surmount the defense of conditional immunity which shields the defendants; and (2) even if the majority is correct in its interpretation of Pennsylvania law, the plaintiff has failed to establish "ordinary negligence" proofs sufficient to impose liability upon the defendants.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX B

[Reported at 364 F. Supp. 53]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 69-78

United States of America ex rel. James Hoey Fear

v.

Alfred T. Rundle, Superintendent, Edwin Andersen, Physician, Raymond Place, Physician, and Commonwealth of Pennsylvania

September 28, 1973

Newcomer, J.

On January 24, 1968, plaintiff James Hoey Fear slipped on a piece of ice in the bed of a truck while attempting to lift a box of trash over the side thereof. In order to avoid falling on his face, the plaintiff fell on the base of the palms of his hands and his knees. In so doing, it was ultimately determined that plaintiff Fear had fractured the navicular or scaphoid bone (hereafter navicular) in his right wrist. Upon treat-

ment of this fracture by defendant Doctors Edwin Andersen and Elmer R. Place, the fracture failed to unite causing plaintiff a loss of motion and pain in his right wrist for which he sues for damages. At the time of this accident, plaintiff James Hoey Fear was an inmate at the State Correctional Institution at Graterford in Montgomery County, Pennsylvania.

Plaintiff commenced this action on January 13, 1969, and alleged violations of the Civil Rights Act as well as ordinary negligence. The Honorable Harold K. Wood on March 17, 1969, dismissed all counts of the complaint alleging violations of plaintiff's civil rights but permitted the action to proceed as a diversity action.

The case was tried without a jury from May 2 to May 8, 1973. On July 12, 1973, plaintiff's minimum sentence was commuted by the Honorable Milton J. Shapp, Governor of Pennsylvania, and plaintiff was released from prison. In accordance with Rule 52(a) of the Federal Rules of Civil Procedure, this Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The plaintiff James Hoey Fear, at the time this suit was commenced, was a citizen of the State of Maryland.

2. The plaintiff was born in Macon, Georgia, on May 6, 1932, and at the time of trial was forty-one (41) years of age.

3. In 1959, just prior to his arrest, the plaintiff was a citizen of the State of Maryland.

4. In 1959, plaintiff was arrested at the age of 27 and subsequently pleaded guilty to the commission of a series of armed robberies. Plaintiff Fear was initially given a prison sentence of twenty-eight and one-half (28½) to fifty-seven (57) years.

5. Plaintiff's minimum sentence was subsequently reduced and on May 8, 1973, plaintiff had four (4) years, nine (9) months and three (3) days remaining to be served on his minimum sentence and fourteen (14) years, nine (9) months and three (3) days remaining to be served on his maximum sentence.

6. On July 12, 1973, the Honorable Milton J. Shapp, Governor of the Commonwealth of Pennsylvania, commuted plaintiff James Hoey Fear's minimum sentence on recommendation of the Board of Pardons as a result of which plaintiff was released from prison on August 11, 1973.

7. The defendants Alfred T. Rundle, Dr. Edwin Andersen, and Dr. Elmer R. Place are citizens of the State of Pennsylvania.

8. On January 24, 1968, the defendant Alfred T. Rundle was the Superintendent of the State Correctional Institution at Graterford (hereafter Graterford).

9. On January 24, 1968, the defendant Edwin Andersen, M.D., was Medical Director at Graterford and was employed on a full time basis in the capacity of Medical Director. Dr. Andersen provided medical services to the inmates at Graterford on a full time basis.

10. On January 24, 1968, the defendant Elmer R. Place, M.D., was employed on a half-time basis by

the Commonwealth of Pennsylvania to provide medical services to the inmates at Graterford prison.

11. Both Doctors Andersen and Place considered themselves to be general practitioners of medicine, and the Court finds that they both were in fact general practitioners on January 24, 1968.

12. On January 24, 1968, plaintiff was a Correctional Industries driver and mechanic at Graterford prison.

13. Part of plaintiff Fear's general duties as a driver of this truck included the disposal of trash from the correctional shops.

14. On January 24, 1968, at approximately 2 p.m., plaintiff was loading trash onto his truck inside the prison when he slipped on a piece of ice in the bed of the truck striking his knees and the base of the palms of his hands.

15. Plaintiff immediately walked to the Maintenance Area to report the accident; shortly thereafter plaintiff was sent to the infirmary for treatment of his wrists.

16. Plaintiff's wrists and in particular his right wrist were examined by Dr. Andersen on January 24, 1968, and he applied a wintergreen liniment and ordered plaintiff to appear the following day for x-rays of both arms.

17. Plaintiff described how he had injured himself to Dr. Andersen on January 24, 1968.

18. On January 24, 1968, plaintiff also received an Ace bandage from the dispensary which he used to wrap his right wrist area.

19. On January 25, 1968, plaintiff returned to the hospital for x-rays of his arms and wrists. Plaintiff also consulted with Dr. Elmer R. Place on January 25, 1968, and as the dispensary card indicates, Dr. Place prescribed an Ace bandage, x-ray of the right hand, and external liniment and aspirin.

20. Sergeant Klock, the x-ray technician, took x-rays of plaintiff's right wrist on January 25, 1968.

21. Sometime shortly after January 25, 1968, Dr. Harper, the x-ray specialist who was called in to read x-rays at Graterford Prison, read the x-rays which were taken of plaintiff's right wrist and on January 30, 1968 made the following report:

> "The right wrist shows some cystic change proximally in the navicular. There is a fracture zone through this area. The cystic changes were not present on a film in 1965, but suggest the injury may be older than a few days."

22. Dr. Place read the January 30, 1968 x-ray report of Dr. Harper relating to plaintiff's right wrist very soon after January 30, 1968.

23. On February 8, 1968, Dr. Andersen made a notation on plaintiff's dispensary card that plaintiff was to see Dr. Allen E. Hamburg for a navicular fracture.

24. Dr. Andersen saw plaintiff again on February 11, 1968 and prescribed an antibiotic, aspirin and some medication for plaintiff's toes.

25. Dr. Andersen saw plaintiff again on February 14, March 13, and April 3, of 1968, for treatment of complaints not related to plaintiff's right wrist.

26. On April 11, 1968, the plaintiff was examined by Dr. Allen E. Hamburg, orthopedic specialist, regarding plaintiff's navicular fracture.

27. Dr. Hamburg's note of April 11, 1968 states the following:

> "Pain in right wrist. Injury January '68. X-ray shows fracture through cyst of navicular. Recommend cast at least two or three months."

28. Dr. Hamburg immediately casted plaintiff's wrist on April 11, 1968.

29. Dr. Andersen made a note to repair the cast on May 3rd and on May 23rd the edges of the cast were padded on advice of Dr. Place.

30. On June 3, 1968, the cast was removed and another cast was applied on that same day. Additional x-rays were requested by Dr. Andersen during this period.

31. On July 11, 1968, Dr. Andersen again ordered additional x-rays and a new cast was applied on this date.

32. Plaintiff's cast was removed some time in August, 1968 and Dr. Hamburg explained to plaintiff that the fracture had failed to unite.

33. Throughout the period from January 24, 1968 until August, 1968, the plaintiff continued to work at his job as Correctional Industries mechanic because he was not given a medical release from work by either Dr. Andersen or Dr. Place.

34. The administrative policy in effect at Graterford during the year 1968, was such that in order for

an inmate to be relieved of his regular duties at the prison for medical reasons, the physician or physicians treating such inmate were required to execute a medical release, relieving the inmate from his regular prison duties.

35. If no medical release was executed by the physician or physicians capable of executing such release, the inmate was required to perform his assigned duties. If an inmate refused to perform his duties, he could be subjected to various punishment jobs or be stripped of his privileges.

36. Plaintiff's average pay per week at Graterford Prison as the Correctional Industries mechanic was approximately $31.00 which amount was considered exceptionally high for the prison at the time of the injury.

37. Dr. Leon Weiner, plaintiff's medical expert, had been practicing medicine for a period of fourteen (14) years in Philadelphia County.

38. Philadelphia County is adjacent to Montgomery County.

39. Graterford Prison is located at Graterford, Montgomery County, Pennsylvania.

40. Dr. Leon Weiner was the only medical expert called to testify on behalf of either plaintiff or defendants with the exception of the defendants themselves.

41. Both Drs. Andersen and Place owed plaintiff Fear the duty of exercising that skill and knowledge possessed and employed by physicians generally in the Montgomery County area with respect to the treatment given to plaintiff's wrist.

42. Dr. Leon Weiner is competent to testify as a general practitioner as to the medical standards which existed in January 1968 in Montgomery County with respect to the diagnosis and treatment of a suspected fracture of the navicular bone of the right hand.

43. The medical standard prevailing in the Montgomery County area in January 1968 with respect to the diagnosis and treatment of a suspected fracture of the navicular bone of the right hand under the facts developed in this case required the defendant doctors to immobilize plaintiff's right hand to preclude movement of the fingers and joints, to advise plaintiff not to work and not to use his hand and to order that x-rays be taken as soon as possible.

44. In addition to the standard dictated by finding No. 43, upon receiving the x-ray report by Dr. Harper, the medical standard in the Montgomery County area in January 1968 would require defendants to refer plaintiff to an orthopedic specialist as soon as possible to decrease the likelihood of non-union of the fracture of plaintiff's navicular.

DISCUSSION

Initially, the Court is faced with two threshold questions of law which bear directly on the outcome of this case. One is the question of the existence *vel non* of diversity jurisdiction and the second relates to the doctrine of sovereign immunity.

We will deal with the question of diversity first. Defendants do not contend that plaintiff has failed to allege the requisite amount in controversy. Rather, they contend that the plaintiff was a citizen of Pennsylvania at the time this suit was commenced on January 13, 1969. Plaintiff asserts that at no time was he a citizen of Pennsylvania prior to commencement of suit or on the date suit was filed.

Plaintiff was arrested and incarcerated in 1959 for his participation in a number of armed robberies all of which were committed in Philadelphia, York, and Dauphin Counties. At the time of his arrest, plaintiff stated that he was living in Baltimore, Maryland and his entire institutional record compiled at Graterford tends to support his statement concerning his residence. The defendants would have us infer from the geographic locations of the armed robberies as well as in one instance, the small amount of money involved that plaintiff must have been from Pennsylvania. We think this fact that the robberies occurred where they did and the fact that in one instance a small amount of money was involved without more cannot support a finding that plaintiff was a citizen of Pennsylvania.

Along these same lines, plaintiff had been "living" at Graterford Prison for approximately ten years prior to the commencement of this action, but no one contends that he intended to stay there for a period of time beyond that required by his sentence. For these reasons we find that plaintiff Fear was a citizen of Maryland and the necessary diversity of citizenship exists.

A more difficult problem exists with respect to the immunity doctrine which as applied to the Com-

monwealth of Pennsylvania and certain public officers thereof still exists subject to various exceptions and nuances which are presently being fought out in the state courts at all levels.

We have dismissed the Commonwealth from this action on a prior occasion for the simple reason that the Commonwealth has not yet given its consent to be sued for whatever private civil wrongs it may have committed and therefore may not be used by a citizen of another state under the Eleventh Amendment of the Constitution of the United States.

However, a more difficult question arises regarding the immunity of Alfred T. Rundle, the Superintendent of Graterford Prison and Drs. Andersen and Place, physicians at Graterford. The defendants are being sued individually for damages arising out of certain alleged negligent acts and/or decisions.

We will deal first with defendant Rundle. The Pennsylvania courts have developed a doctrine of immunity over the years which appears to provide protection from litigation for those high public officials who are agents of the state and who have policy-making functions. However, this protection does not apply to lower level employees, it is said, whose functions do not involve the making of policy or involve discretionary decisions. See *Ammlung v. Platt,* 224 Pa. Superior Ct. 47 (1973). Actually the distinction between high and low level employees appears not to be controlled by the title of the office alone but rather by the nature of the particular decision emanating from that office. The present state of the law of Pennsylvania State employee immunity is unclear because the

doctrine of sovereign immunity itself is being subjected to increasing criticism, and the cases appear to be controlled more by the factual situations involved rather than by the application of the high and low level employee dichotomy. Normally, a high level employee engages in more "policy making decisions" than a low level employee. But a high level employee may also make a decision which is purely operational and not discretionary.

It is therefore necessary, in order to determine the reasonableness or unreasonableness of a particular decision by either a high or low level employe, to examine whether or not there are any readily ascertainable standards in existence against which the particular decision or action can be measured. See *Hendry v. U. S.*, 418 F. 2d 774 (2nd Cir. 1969).

Plaintiff alleges that defendant Rundle, acting as Superintendent of Graterford at the time this incident took place, had failed to properly oversee and manage the operation of the prison and had further failed to adequately create and maintain standards of care within the Institution and that such failure constituted a breach of a duty owed to the plaintiff James Hoey Fear. Plaintiff further alleges that defendant Rundle's breach of duty was a substantial factor in bringing about the resultant injury to his right wrist. However, plaintiff has the burden of showing that defendant Rundle's alleged nonfeasance was not in the nature of a policy-making decision so that we can determine whether or not Superintendent Rundle is a high or low level official of the State of Pennsylvania within the meaning of *Montgomery v. Philadelphia*, 392 Pa. 178, 140 A. 2d 100 (1958), where the question

of his governmental immunity is raised. We feel confident that if such evidence relating to the nature and function of defendant Rundle's office as Superintendent of Graterford Prison had been introduced, that such evidence would show that he was a high level official within the meaning of *Montgomery v. Philadelphia,* supra. See also *Jonnet v. Bodick,* 431 Pa. 59 (1968).

Apart from defendant Rundle's position as a high or low level official which dichotomy, we previously indicated does exist but which may have limited utility when deciding a particular case, no evidence was introduced at trial by plaintiff which would indicate a failure on the part of defendant Rundle to exercise reasonable care in discharging those duties which do not involve any discretion on his part in his capacity as a state official which would affect the plaintiff's right to receive adequate medical care at Graterford Prison. Without such evidence, we might well conclude that a separate state agency or sub-agency of the Bureau of Prisons was charged with the duty of administering medical care for all state prisons in Pennsylvania and that Superintendent Rundle had no authority or decision-making power with respect to the adequacy or inadequacy of the medical treatment of prisoners at Graterford on January 24, 1968. We therefore conclude that regardless of whether or not he is immune from tort liability, there is not sufficient evidence in the record upon which to base a finding or conclusion that defendant Rundle was in fact negilgent.

We must now determine whether or not the defendant doctors are immune from tort liability assum-

ing such liability exists. Each doctor is an employee of the Commonwealth of Pennsylvania. Dr. Andersen on January 24, 1968, was a full-time employee and medical director of Graterford Prison, and Dr. Place was a part-time employee of the prison who maintained a private practice outside the prison in Montgomery County. Applying the high and low level official criteria as set forth in *Montgomery v. Philadelphia,* 392 Pa. 178, 140 A. 2d 100 (1958), to the individual doctors in this case does present us with some difficult matters of judgment. First, it is clear from the testimony of the doctors themselves that they were responsible for providing medical treatment and consultation in the prison in January 1968. Dr. Andersen testified that he was the medical director and we find from his testimony that he was in charge of the prison hospital and the prison dispensary and infirmary. Dr. Place was only available in the infirmary during sick call and was not a full-time employee of the prison. Both doctors were general practioners and if in their opinion an inmate needed the services of a specialist, they would call in such specialist for consultation. In the case of Dr. Hamburg, the orthopedic specialist who was on January 24, 1968 the consulting orthopedist for the prison, it was testified that except in real emergencies, approximately fifteen inmates would have to require his services, before he would be called in, the medical standard then and there pervailing at Graterford and in Montgomery County would dictate that an inmate suffering from a possible fracture of the navicular bone be referred to Dr. Hamburg for examination before the list reached the required number of 15 even if the inmate were number 14 on the list to

avoid exactly what transpired in this case. It would appear that the "list of 15" decision itself constituted more of a medical decision than a pure policy decision.

Certainly the importance of having physicians at the prison is an obvious and necessary part of running a prison. The importance of who the physicians are becomes even more important in a prison because Drs. Anderson and Place were the only physicians available to the inmates at Graterford at that time on a regular basis.

The last consideration we must test as to whether these doctors are high or low level officials within the meaning of *Montgomery v. Philadelphia,* 392 Pa. 178, 140 A. 2d 100 (1958) is whether or not these doctors have "policy making functions." Dr. Andersen as medical director we must assume, controlled the hours and the days on which sick call was held. He would also as a matter of policy decide how sick call would be conducted and whether or not inmates would line up outside both his and Dr. Place's offices for sick call or wait in their cells for an escort. Dr. Place might have participated in such discussions at the time the policy was instituted. But none of these policy decisions, if they are policy decisions in the true sense of the word, are being questioned by plaintiff. Likewise, the fact that they are or are not policy decisions would not have changed the medical results complained of in this case; nor would the classification of these doctors as high level or low level officials or employees have changed the results.

This suit does not involve our examination of any discretionary act committed by the defendants.

Readily available medical standards do exist in Montgomery County which we can use to decide whether or not defendants' conduct conformed to that standard.

For the foregoing reasons, we are of the opinion that the doctors in this case are not immune from tort liability, if such exists, and may be sued individually by plaintiff Fear. See also *Meads v. Rutter,* 122 Pa. Superior Ct. 64, 184 A. 560; *McSparran v. H. J. Williams Co.,* 249 F. Supp. 84 (E.D. Pa. 1965).

CONCLUSIONS OF LAW

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1. This Court has jurisdiction over the parties and the subject matter.

2. Dr. Edwin Andersen was a general practitioner of medicine on January 24, 1968.

3. Dr. Elmer R. Place was a general practitioner of medicine on January 24, 1968.

4. Both Drs. Andersen and Place owed plaintiff Fear the duty of exercising skill and knowledge possessed and employed by physicians generally in the Montgomery County area.

5. The standard of medical expertise required of physicians at Graterford Prison is the same standard of medical expertise required of physicians in Montgomery County.

6. The medical standards of the community in January 1968 required that plaintiff's right wrist be immobilized, that he be advised not to use his right

wrist or do any work, and that x-rays be taken immediately.

7. The medical standards of the community in January 1968, further required that upon receipt by Drs. Andersen and Place of Dr. Harper's x-ray report, immediate consultation with an orthopedic specialist be ordered.

8. The failure of Drs. Andersen and Place to immobilize plaintiff's wrist constituted a breach of duty owed to the plaintiff by defendants and defendants were therefore negligent. Such negligence was a substantial factor in causing plaintiff's fracture of the navicular to heal improperly.

9. The failure of Drs. Andersen and Place to execute a medical release on behalf of plaintiff Fear so that the plaintiff would not have been required to perform his duties as Correctional Institute mechanic constituted a breach of duty owed to the plaintiff by defendants and defendants were therefore negligent. Such negligence was a substantial factor in causing plaintiff's fracture of the navicular to heal improperly.

10. Section 372 of Title 61 Purdon's Pa. Stat. Annotated states in part the following:

> . . . "The physician shall inquire into the mental as well as the bodily state of every prisoner, and when he shall have reason to believe that the mind or body is materially affected by the discipline, treatment, or diet, he shall inform the warden thereof, and shall enter his observation on the journal hereinafter directed to be kept, which shall be an authority for the warden for

altering the discipline, treatment or diet of any prisoner, until the next meeting of the inspectors, who shall inquire into the case and make orders accordingly."

11. The above statute was in effect in January, 1968.

12. The failure of either Doctor Andersen or Dr. Place to comply with the statute constitutes negligence *per se,* and such negligence was a substantial factor in causing plaintiff's fracture of the navicular to heal improperly.

13. The failure of Drs. Andersen and Place to immediately arrange for orthopedic consultation with Dr. Hamburg constituted a breach of duty owed to plaintiff Fear by the defendants, and the defendants were therefore negligent. Such negligence on the part of defendants was a substantial factor in causing plaintiff's fracture of the navicular to heal improperly.

14. The failure of plaintiff's navicular to unite properly was foreseeable.

15. Plaintiff James Hoey Fear was not guilty of contributory negligence.

16. The defendants Drs. Andersen and Place are both liable to the plaintiff James Hoey Fear for any damages proximately caused by their negligence which in this case would be damages arising out of the failure of the navicular bone in plaintiff's right wrist to unite properly.

DISCUSSION

Dr. Leon Weiner, plaintiff's expert, introduced evidence that the standard medical practice in the community on January 24, 1968 would have required under the facts presented here that defendants immobilize the plaintiff's right hand so that he could not move his fingers or joints and advise him not to use the hand for any purpose and not to work. He further testified that upon receipt of Dr. Harper's x-ray report, such immobilization and non-work would be required to continue but now the medical standards in the community at that time would have additionally required that plaintiff be referred to an orthopedic specialist for consultation as soon as possible.

Prisoners at penal institutions have a right to receive the same medical attention supplied to the community generally. A prisoner pays his debt to society by serving his time in a penal institution and certainly no one expects such institutions to contain all the comforts of home. But a prisoner is entitled to walk out of prison on the day of his or her release with all of his or her physical and mental faculties intact and he or she should have the right to sue for damages if injury is caused by a physician's negligence while in prison.

The evidence in this case shows much more by way of omission than commission. The chronology of events as set forth in plaintiff's medical records while at Graterford are difficult to follow and at best present a spotty picture as to what procedures and advice were given to plaintiff after the January 30, 1968 x-ray re-

port by Dr. Harper. Also the facts concerning when Dr. Andersen finally perceived that plaintiff's navicular bone in his right wrist was fractured are nonexistent. Also, the facts surrounding the referral to Dr. Hamburg for consultation are certainly unclear.

In all such negligence cases, and particularly in this case, the burden is on the defendant to come forward and explain how certain events took place upon the presentation by plaintiff of a prima facie case. Here plaintiff has made out a case of negligence against both Drs. Andersen and Place but not without difficulty. But as the record indicates, this is an unusual case in that the plaintiff was an inmate at Graterford Prison during the entire pendency of this suit. The medical records and witnesses were particularly difficult for plaintiff to obtain because of this obvious disadvantage. We are of the opinion that plaintiff did all he could in presenting his case to the Court under the handicaps of the situation.

DAMAGES

Plaintiff Fear's navicular bone in his right wrist was fractured by the accident which took place on January 24, 1968. Such fracture, as the record indicates, has failed to unite properly because as we have found, the defendant doctors were negligent. This condition is permanent and cannot be corrected by surgery.

Prior to his incarceration, plaintiff played the guitar professionally and was a member of the Baltimore musicians' union. Plaintiff was able to play for

the sustained periods of time required of guitarists generally prior to his accident. Now, plaintiff's right wrist becomes stiff and painful if he plays his guitar for more than twenty minutes.

As was indicated by the testimony and the documents in evidence, plaintiff had attained a high level of proficiency as a mechanic at Graterford. Although there is no evidence which tends to show that plaintiff received formal mechanical training, plaintiff testified that he was earning approximately $30 to $32 per week as a Correctional Industries mechanic. Plaintiff further testified that he worked on large trucks as well as the Correctional Industries director's automobile. After he lost his job as Correctional Industries mechanic as the result of his having filed the suit in the instant case, plaintiff gradually worked his way up to a mechanic's position in the weave shop. Plaintiff received a citation or award while working in the weave shop for a mechanical innovation which he developed.

Because of his injury, plaintiff is not able to perform certain mechanical tasks. He cannot lift heavy truck tires nor can he perform many of the simple twisting or pushing jobs requiring the use of both hands. He has a 10 to 15 percent loss of motion in his right wrist and his wrist stiffens after prolonged work making him a hazard to himself and others in a garage situation.

Dr. Leshner testified that plaintiff could perform the tasks required of a low grade mechanic and that in such position, plaintiff could expect to earn approximately $6700 to $8000 a year. The same earnings for a journeyman mechanic would be approximately

$12,000 to $15,000 per year so that plaintiff's minimum loss of earning power would be approximately $5000 per year. Actuarial Leonard Goodfarb testified that a $5000 per year loss of earnings for plaintiff would result in a $99,935 loss of earnings for his work life expectancy reduced to present worth. Plaintiff's work life expectancy as a mechanic is 24 years. However, we think that because of his intelligence and experience, plaintiff will be able to obtain work as a higher grade mechanic or as a service manager thus reducing his damages for loss of earnings considerably. True he will not be able to perform certain tasks which we have previously enumerated, but he would not be required to perform such tasks if he were to be given a job as a service manager or mechanical consultant. We are of the opinion that $15,000 will compensate plaintiff for his loss of earning capacity in the future as a mechanic.

Likewise, we feel that the $18,842 representing plaintiff's loss of earnings as a guitar player for his work life expectancy reduced to present worth must be adjusted. Mr. Fear was no doubt a good guitar player in his day and did play professionally as he indicated. But music tastes have changed over the years, and we cannot say that Mr. Fear would be able to resume playing on weekends at the same rate he received as a union player or that the type of music he played in 1953 would be acceptable. In view of the above consideration, we are of the opinion that $3,000 will compensate plaintiff for his loss of future earning capacity as a guitar player.

We likewise award plaintiff $1,000 for pain and suffering and $1,000 for future medical costs for med-

ication and orthopedic consultation. We view these amounts as reasonable under the facts of this particular case.

Any statements of fact or law found in this Court's discussion above which have not been specifically enumerated in the sections entitled "Findings of Fact" and "Conclusions of Law" respectively, are hereby designated "Supplemental Findings of Fact and Conclusions of Law."

ORDER

AND NOW, to wit, this 28th day of September, 1973, it is hereby Ordered that judgment be entered in favor of plaintiff, James Hoey Fear, and against defendant, Edwin Andersen and defendant, Elmer R. Place in the amount of Twenty Thousand ($20,000) Dollars.

IT IS SO ORDERED.

CLARENCE C. NEWCOMER,
J.

APPENDIX C

Article I, Section 11 of the Constitution of the Commonwealth of Pennsylvania:

> **§11. Courts to be open; suits against the Commonwealth**
>
> All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.

Historical Note

Prior Constitutions

Constitutions of 1790 and 1838, Art. 9, §11, contained provisions identical to this section.

APPENDIX D

Section 8 of the Act of Legislature of the Commonwealth of Pennsylvania of April 23, 1829, P. L. 341:

Sect. 8. *And be it further enacted by the authority aforesaid,* That the following rules and regulations for the better ordering and government of said penitentiaries shall be and continue in force until altered by the legislature, or in the manner hereinafter stated.

. . .

ARTICLE IV

Of the duties of the physician

The physician shall visit every prisoner in the prison twice in every week, and oftener if the state of their health requires it, and shall report once in every month to the inspectors.

He shall attend immediately on notice from the warden that any person is sick.

He shall examine every prisoner that shall be brought into the penitentiary, before he shall be confined in his cell.

Whenever, in the opinion of the physician, any convict in the penitentiary is so ill as to require removal, the warden shall direct such removal to the infirmary of the institution, and the prisoner shall be kept in the infirmary until the physician shall certify that he may be removed without injury to his health, and he shall then be removed to his cell.

He shall visit the patients in the infirmary at least once in every day, and he shall give such directions for the health and cleanliness of the prisoners, and when necessary, as to the alteration of their diet, as he may deem expedient, which the warden shall have executed: *Provided,* They shall not be contrary to the provisions of this law, or inconsistent with the safe custody of the said prisoners; and the directions he may give, whether complied with or not, shall be entered on the journal of the warden and on his own.

The physician shall inquire into the mental as well as the bodily state of every prisoner, and when he shall have reason to believe that the mind or body is materially affected by the discipline, treatment or diet, he shall inform the warden thereof, and shall enter his observation on the journal hereinafter directed to be kept, which shall be an authority for the warden for altering the discipline, treatment or diet of any prisoner until the next meeting of the inspectors, who shall inquire into the case and make orders accordingly.

The physician shall keep a journal, in which opposite to the name of each prisoner shall be entered the state of his health, and if sick, whether in the infirmary or not, together with such remarks as he may deem important, which journal shall be open to the inspection of the warden and the inspectors, and the same together with the return provided for in the first article in this section, shall be laid before the inspectors once in every month, or oftener if called for.

The prisoners under the care of the physician, shall be allowed such diet as he shall direct.

No prisoner shall be discharged while labouring under a dangerous disease, although entitled to his discharge, unless by his own desire.

The infirmary shall have a suitable partition between every bed, and no two patients shall occupy the same bed, and the physician and his attendants shall take every precaution in their power to prevent all intercourse between the convicts while in the infirmary.